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No. 74

The Supreme Court of the United States

OCTOBER TERM, 1942

WALTER L. MANGUS AND
ROSE L. MANGUS,
Petitioners,

vs.

MATTHEW A. MILLER,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners' Brief on Motion to Dismiss Writ of Certiorari

J. D. SKEEN,
E. J. SKEEN,
ATTORNEYS FOR PETITIONERS.

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STATEMENT

The respondent has moved to dismiss the writ of certiorari on the ground that the petitioners have ". . . waived their right to appeal from and to have reviewed the judgment and decision of the Circuit Court of Appeals below by having accepted said judgment and decision and having acquiesced therein and accepted the benefits thereof and are now estopped in the premises . . ." The motion is based upon an order of the district court releasing to one of the attorneys for the petitioners, the sum of $130, deposited

by the debtors as rental, and on the acceptance of the money by their attorney. The record discloses that the respondent's motion to strike real estate from the schedules was filed shortly after the commencement of the proceeding. There is nothing before this Court to indicate what occurred in the district court pending the appeal to the Circuit Court of Appeals. We consider the following portion of the record pertinent and have attached certified copies hereto:

IN UNITED STATES DISTRICT COURT FOR DISTRICT OF UTAH

In the Matter of WALTER L. MANGUS, Debtor.	No. 15527 NOTICE

To the Creditors of Walter L. Mangus:

Take notice that the above debtor has deposited with the Court the sum of $130.00, being rental fees under subsection "S" of Section 75 of the Bankruptcy Act.

You are further notified that this matter will be on the calendar on Saturday, November 8, 1941, at 10:00 A. M., Salt Lake City, for hearing on disposition of said rent fees to be used, first, for payment of taxes and upkeep of the property, and the remainder to be distributed as their interest may appear. Will you please mail proof of claim of any indebtedness to this office on or before the date of the hearing.

Dated this 31st day of October, 1941.

W. B. WILSON, Clerk.
By Helen L. Taylor,
Deputy Clerk.

A copy of the foregoing notice was mailed to respondent on October 31, 1941 as shown by the affidavit of the clerk.

MINUTE ENTRY — NOVEMBER 8, 1941
No. 15527

On this 8th day of November, 1941, debtor appearing by J. D. Skeen, his attorney, and hearing on disposal of rental money continued until November 29, 1941.

MINUTE ENTRY — NOVEMBER 29, 1941
No. 15527

On this 29th day of November, 1941, debtor appearing by J. D. Skeen, his attorney, and good cause appearing, this matter continued pending decision by the Circuit Court of Appeals.

IN THE UNITED STATES DISTRICT COURT, DISTRICT OF UTAH, CENTRAL DIVISION.

ORDER VACATING FORMER ORDER AND STRIKING PROPERTY HEREIN

Bankruptcy No. 15527

Matthew A. Miller having filed herein on January 27, 1941 his motion and on February 8, 1941 his supplemental motion to strike the property hereinafter described upon the grounds that the court was and is without jurisdiction thereof, said motions being supported by the affidavit of said Miller and the supplemental affidavit of his attorney, H. F. Thomas, and said motion and supplemental motion having been overruled and denied by order of this Court February 24, 1941, which order was reversed and set aside on appeal by the United States Circuit Court of Appeals, Tenth Circuit, upon the grounds that the interest of said debtors and each of them in said property under and by virtue of the agreement for sale thereof men-

tioned in said affidavits had been duly forfeited and terminated as of January 3, 1941 and that this Court therefore had no jurisdiction thereof.

NOW THEREFORE, on motion of H. P. Thomas, Esq., attorney for said Matthew A. Miller, and in pursuance of said reversal and the mandate of said Circuit Court of Appeals heretofore filed herein, and good cause appearing, it is hereby ordered, adjudged and decreed:

1. That the order of this Court heretofore given and made February 24, 1941 overruling and denying said motion and supplemental motion of Matthew A. Miller to strike said property herein be and is vacated, set aside and held for naught.

2. That said motion and supplemental motion be and are hereby granted and said property stricken from the schedules and proceedings herein, the court having no jurisdiction thereover whatever. Said property is situate in Davis County, Utah, towit:

(Then follows description of land).

Dated this 6th day of March, 1942.

TILLMAN D. JOHNSON, District Judge.

FILED in United States District
Court, District of Utah,
March 6, 1942.

W. B. WILSON, Clerk,
By V. P. Ahlstrom, Deputy.

CERTIFICATE OF CLERK

UNITED STATES OF AMERICA)
) ss.
..... District of Utah)

I, W. B. Wilson, Clerk of the United States District Court in and for the.....District of Utah, do hereby

certify that the annexed and foregoing is a true and full copy of the original

Notice mailed to creditors regarding distribution of rental fee, Affidavit of Mailing of Notice, and Minute Entry of November 8, 1941, and Minute Entry of November 29, 1941, and Order Vacating Former Order and Striking Property Herein, signed by Judge Johnson and filed on March 6, 1942, in Case No. 15527.

In the Matter of
WALTER L. MANGUS and
ROSE L. MANGUS,
Debtors.

now remaining among the records of the said Court in my Office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Salt Lake City, this 5th day of November, A. D., 1942.

W. B. Wilson, Clerk,
By Margaret Johnson,
Deputy Clerk

ARGUMENT

The rule of waiver and estoppel relied upon by respondent is limited in its application to cases in which the conduct of the party seeking a review indicates clearly and unmistakably that he acquiesced in the judgment and intended to waive the right of appeal.

4 C. J. S., Section 211, page 397.
Saunders v. Busch-Everett Co., 71 So. 153; 138 La. 1049.

This Court has held that if a release of errors is not expressed, it can arise only on the principle of estoppel.

Embry v. Palmer, 107 U. S. 3; 27 L. Ed. 346.

It is settled by this Court that if the losing party merely submits to a judgment, it does not constitute a waiver of the right of appeal.

Dakota County v. Glidden, 113 U. S. 222; 28 L. Ed. 981.
O'Hara v. McConnell, 93 U. S. 150; 23 L. Ed. 840.
Erwin v. Lowry, 7 How. 184; 12 L. Ed. 655

In the case of Erwin v. Lowry, supra, the plaintiff was given a writ of possession upon condition that he deposit with the sheriff, for the use of the defendant, the sum of $436.55. The deposit was made, and the sheriff paid the money to the defendant, taking his receipt. The defendant thereafter filed a writ of error, and the plaintiff moved to dismiss. The motion was denied. The Court said:

> "And we take the rule to be, that although a decree in equity is fully executed, at the instance of the successful party, he cannot complain of his own voluntary acts, if he does perform a condition imposed upon him before he can have the fruits of the decree, although the other party derives a benefit from such performance. If it was otherwise, a writ of error in such a case as the present, or an appeal in equity, might be defeated after the writ of error or appeal was sued out, where there was no supersedeas; and here there was none.

> Five years is the time allowed for prosecuting appeals to and writs of error out of this Court, and in many cases decrees and judgments are executed before any step is taken to bring the case here: yet in no instance within our knowledge has an appeal or writ of error been dismissed on the assumption that a release of errors was implied from the fact that money or property had changed hands by force of the judgment or decree. If the judgment is reversed, it is the duty of the in-

ferior court, on the cause being remanded, to restore the parties to their rights."

In the case of

Dakota County v. Glidden, supra,

cited by counsel for the respondent, the Court stated the rule thus:

> "There can be no question that a debtor against whom a judgment for money is recovered may pay that judgment and bring a writ of error to reverse it, and if reversed can recover back his money. And a defendant in an action of ejectment may bring a writ of error and, failing to give a supersedeas bond, may submit to the judgment by giving possession of the land, which he can recover if he reverses the judgment by means of a writ of restitution. In both these cases the defendant has merely submitted to perform the judgment of the court, and has not thereby lost his right to seek a reversal of that judgment by writ of error or appeal."

The explanation of the withdrawal of the rent money is found in the record. The district court, in accordance with the mandate of the Circuit Court of Appeals made an order striking all of the debtors' real estate from the schedules because of lack of jurisdiction. (Page 4, this brief). There being no other property subject to administration under the Bankruptcy Act the court obviously had no jurisdiction over the money deposited as rental, and it accordingly directed that it be returned.

The order dated March 13, 1942, which respondent considers so significant, merely directs the clerk as to the disposition of the rent money. Prior to the decision of the Circuit Court of Appeals the matter of distribution of the rent money had been before the district court two times

and the court continued the hearings awaiting the decision on the appeal. (Page 3, this brief). When the Circuit Court of Appeals held with the respondents, the district court after reciting that it had stricken the real estate in "obedience" to the mandate of the Circuit Court of Appeals, ordered the return of the money to one of the attorneys for the debtors instead of to the debtors personally. If the order had not been made, the clerk would no doubt have mailed the check to the debtors.

In view of the mandate of the Circuit Court of Appeals, and the order of the district court pursuant to the mandate, the attorney had no alternative but to receive the money and to hold it awaiting final disposition of the case in this Court. No supersedeas bond was filed, and the parties to the suit, and the clerk are all obliged to obey the order of the Court striking the property from the schedules until it is set aside or reversed. The clerk of the court could not, in view of the status of the case, act as a stakeholder of the money which belonged to the debtors.

This case falls squarely under the rule discussed above that mere submission to a decree does not constitute a waiver of the right to have it reviewed.

The respondent's argument that the petitioners took the benefits of the judgment appealed from is without merit. The judgment of the Circuit Court of Appeals merely ordered the striking of the property from the schedules. The effect was to deny to the petitioners all relief under the statute, and it exposed them to ouster proceedings. The judgment makes no mention of rent money, and it was not an issue in the Circuit Court of Appeals and cannot be an issue here. The debtors received no benefit from the judgment. The return of the money to them by the clerk was, in effect, a return of a tender, made in compliance with the provisions of

Section 75 (s) of the Bankruptcy Act.

Their financial position was not improved because of the return of the money. As a result of the ruling of the Circuit Court of Appeals, they became, by State law, tenants at will, (the real estate contract having been terminated) and were subject to ouster from the premises by unlawful detainer proceedings. Under the provisions of

Title 104, Chapter 60, Revised Statutes of Utah, 1933

such tenants are liable for treble damages.

There is no element of estoppel present. The petitioners made no misrepresentations; there was no misleading and no change of position by respondents.

Haschenberger v. Dennis, 225 N. W. 25; 118 Neb. 411.

There being no estoppel and no express release of errors, the motion to dismiss must be denied.

Embry v. Palmer, 107 U. S. 3; 27 L. Ed. 346.

The cases cited in respondent's brief on the motion are clearly distinguishable from this case. In each instance, the appellant accepted money or property awarded to him by the decree, and the court properly held, that by accepting the benefits, he was precluded from appealing. The benefits accepted were, in each case, the fruits of the litigation. In the instant case, there were no benefits to petitioners. There was no controversy over the rent money. It was deposited with the clerk to be thereafter distributed as provided by Section 75 (s).

The result of this certiorari proceeding will not determine the ownership of the money. It always belonged to the debtors and will continue to belong to them regardless of the ultimate decision on the question of jurisdiction. If this case is reversed and the real estate is declared sub-

ject to the jurisdiction of the bankruptcy court, the debtors will necessarily deposit with the clerk any rent money which is then due under the order of the district court. There has been and can be no prejudice to the respondent by reason of the withdrawal of the money. As stated by this Court, in the case of

Erwin v. Lowry, supra,

> "If the judgment is reversed, it is the duty of the inferior court, on the cause being remanded to restore the parties to their rights."

It is respectfully submitted that the respondent's motion to dismiss should be denied.

J. D. SKEEN,
E. J. SKEEN,
Attorneys for Petitioners.